79-1548

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

IN RE: ESTATE OF PERRY CARLTON
DECEASED

ALBERTA CARLTON HAYES, RUCY C.
TEAGUE, CHARLES H. CARLTON, et al.,

Petitioners

v.

LUCY JANE CARLTON ROGERS,

Respondent

FLORIDA SUPREME COURT
CASE NO. 51,413

FLORIDA 4TH DCA
CASE NO. 75-1874

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PETITION FOR CERTIORARI

Petitioners, ALBERTA C. HAYES, RUBY C. TEAGUE, CHARLES H. CARLTON et al., pray that a Writ of Certiorari be issued to review a judgment of the Supreme Court of Florida and a judgment of an individaul thereof relating to judicial disqualification entered in IN RE: ESTATE OF PERRY

CARLTON, DECEASED, ALBERTA CARLTON HAYES et al., v. LUCY JANE CARLTON ROGERS, both dated January 10, 1980 (not yet reported). (Appended hereto on pages 105-124 of the Appendix.) Pursuant thereto, Justice Ben Overton declined to recuse himself and participated in the final determination, on Petition for Rehearing, of a Petition for Certiorari filed in the Florida Supreme Court by the Petitioners on direct-conflict grounds to review a decision of the District Court of Appeal, Fourth District, in Rogers v. Hayes et al., 348 So.2d 896 (Fla. App. 4th, 1977). The Petition for Certiorari was denied for lack of jurisdiction by a per curiam decision, with a strong dissenting opinion, dated March 8, 1979, (pages 46-61 of the Appendix) and Petition for Rehearing was denied on January 10, 1980 (page 125 of the Appendix). Both decisions were made by a sharply divided court (4-3) and are

not yet reported.

Petitioners requested and were granted a Stay by the Florida Supreme Court up to and including February 11, 1980, to allow Petitioners to seek review in the United States Supreme Court and to obtain any further stay from that Court. A copy of the Stay Order entered January 22, 1980, is incorporated as page 19 of the Appendix.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Section 1257(3), Title 28, U.S.C., authorizing review of the judgment or decree of a state court "whereby any title, privilege, or immunity is specially set up or claimed" under the Constitution of the United States. Like all litigants, the Petitioners had a due-process right to have their cause heard by a fair and impartial tribunal. By virtue of the decisions of the Supreme Court and Justice

Overton dated January 10, 1980, referred to above, Justice Overton participated in the decision declining to take jurisdiction in a clear-cut case of direct-conflict certiorari, inviolation of Petitioners' right to a fair and impartial tribunal under the due process clause of the United States Constitution.

Moreover, under Section 4, Article V, Fla. Const., a litigant has a right to invole the jurisdiction of the Florida Supreme Court to review a decision of a District Court of Appeal that is in direct conflict with a decision of the Supreme Court of Florida on the same point of law. Thus, when our court of last resort declines, without opinion, to take jurisdiction to review a decision of a district court of appeal that is patently in direct conflict with a previous decision of the court, its action in this respect is not only a disservice to the Bench and the

Bar of this state in "muddying up" the waters in areas of the law; it is also a denial to that particular litigant of the constitutional right of review in direct-conflict cases granted by the Florida Constitution. And it seems clear that the Court's arbitrary failure and refusal to comply with the mandate of the Florida Constitution is a failure to comply with the "essential requirements of law" in violation of federal due-process guarantees.

QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE

WHETHER DUE PROCESS REQUIRES A JUDGE TO DISQUALIFY HIMSELF BECAUSE OF A CLOSE, INTIMATE PERSONAL FRIENDSHIP WITH ONE OF THE ATTORNEYS IN A CASE IN WHICH HIS VOTE WOULD BE THE DECIDING VOTE IN A 4-3 DECISION AND OTHER SPECIAL CIRCUMSTANCES.

QUESTION TWO

WHETHER A COURT'S ARBITRARY DISREGARD OF A RIGHT GRANTED BY A STATE CONSTITUTION CONSTITUTES A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW SUFFICIENT TO

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QUESTION TWO

WHETHER A COURT'S ARBITRARY DISEGARD OF A RIGHT GRANTED BY A STATE CONSTITUTION CONSTITUTES A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW SUFFICIENT TO

VIOLATE A LITIGANT'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE UNITED STATES CONSITUTION.

CONSTITUTIONAL PROVISIONS INVOLVED

The right to trial by a fair and impartial tribunal is guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution, which says:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

And the Fifth Amendment to the United States Constitution says no person can be "deprived of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

The basic litigation arose out of a controversy concerning the right of the Respondent, LUCY JANE CARLTON ROGERS, to inherit a portion of the estate of one

PERRY CARLTON, who died intestate on April 4, 1970, leaving only collateral descendants (nieces and nephews, great-nieces and -nephews, and one great-great niece) as his heirs at law to share his estate of some $3,000,000.00. The Petitioners are the heirs at law who are the blood relatives of the decedent. The Respondent was not related by blood to the decedent but was the adopted daughter of a brother of the decedent who predeceased the decedent.

In his Order of Determination of Heirs, dated September 26, 1975, the able Probate Judge (now a Justice of the Florida Supreme Court) relied on the decision of the Florida Supreme Court in In Re Hewett's Estate, 13 So.2d 904 (Fla. 1943) and similar cases in which it was held that an adopted child had no right under the Florida Statute of Descent and Distribution, Section 731.30, to inherit

intestate property from adoptive kindred other than his or her adoptive parents. A copy of the Order of September 26, 1975, is appended hereto as pages 1-11 of the Appendix.

On appeal, the District Court of Appeal, Fourth District, reversed Rogers v. Hayes et al., supra, 348 So.2d 896, appended hereto as pages 12-18 of the Appendix.

In due course, the Petitioners sought relief in the Florida Supreme Court of filing a Petition for Certiorari on direct-conflict grounds as authorized by Section 4, Atricle V, Fla. Const. The rocy road which this Petition traveled is relevant here: The Petition was denied on November 30, 1977, by a sharply divided court (4-3), with then Chief Justice Overton and Justices England, Sundberg, and Karl voting to deny relief, and Justices Adkins, Boyd, and Hatchett dis-

senting. On Petition for Rehearing, Justice Karl receded from his former decision denying review and joint the dissenters; and, in an order dated February 1, 1978, the order denying the Writ was vacated and the Writ was granted with oral argument set for April 11, 1978. Thereafter, but prior to oral argument, Justice Karl resigned from the Court and First District Court of Appeal Judge Woodrow Melvin was assigned to the Court as an Associate Justice replacing resigned Justice Karl. Almost a year after oral argument, the Court finally entered its order, dated March 8, 1979, quashing the Writ previously issued and dismissing the Petition on the ground that the Court was without jurisdiction. The Court was again divided, with Chief Justice England and Justices Overton, Sundberg, and Hatchett voting to dismiss the Petition,

and with a strong and comprehensive dissenting opinion by Senior Justice Adkins, concurred in by Justice Boyd and Associate Justice Melvin. (The Order of March 8, 1979, with dissenting opinion, is appended hereto as pages 46-61 of the Appendix.)

A Petition for Rehearing was filed on March 27, 1979, the Petitioners filed in the cause a Suggestion for the Disqualification of Justice Overton, a copy of which is appended hereto as pages 62-104 of the Appendix. The Petition pointed out the close personal relationship that existed between Justice Overton and the attorney who represented the Respondent in the trial court (and allegedly in the appellate proceedings, although not her attorney of record) and noted that Justice Overton, then Chief Justice, has assigned two judges from other districts (Judges Robert P. Smith, Jr., and Warren H. Cobb) to hear oral argument in the cause on the

appeal to the Fourth District Court of Appeal even though qualified judges of the Fourth District were available, and that it was these two assigned judges who decided the appeal in Rogers v. Hayes, supra, contrary to the Hewett decision, with the regualr Fourth District judge dissenting. It was stated that, in these circumstances, the Petitioners had cause to and did fear and believe that they had been denied a fair and impartial hearing in the Fourth District Court of Appeal and in the Supreme Court in violation of their due process rights under the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 2 and 9, Declaration of Rights, Constitution of Florida, 1968 Revision, and that they will not receive a fair and impartial hearing by and before Justic Ben F. Overton and will be denied due process of law in the

event that he sits as a member of the Supreme Court of Florida upon its consideration of and determination of their Petition for Rehearing. (Their statements alleging violation of their federal constitutional rights are found on pages 79-80 of the Appendix.)

As noted above, the Suggestion for Disqualification was filed by the Petitioners on March 27, 1979, following the filing of their Petition for Rehearing on March 20, 1979. On January 10, 1980, the Supreme Court entered its Order in response to the Suggestion, receding from previous decisions of the Court in which suggestions for disqualification of one of its members had been ruled on by the Court, and holding that "each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances."

(Pages 105-108 of the Appendix.) On that same date, Justice Overton filed in the cause his "Denial of Request for Recusal," finding that (1) the request for his disqualification was not timely filed and thus any right in this respect was waived by the Petitioners and (2) even if timely filed, a request for disqualification based on a friendship with an attorney in the cause was not legally sufficient to require disqualification. (Pages 109-124 of the Appendix.) Also on this same date, January 10, 1980, the Petitioners' Petition for Rehearing was denied by a divided court without opinion, with Chief Justice England and Justices Sundberg, Overton, and McDonald (who had replaced Justice Hatchett after his resignation to become a federal judge) constituting a majority in favor of denial, and Senior Justice Adkins, Justice Boyd, and Associate

Justice Melvin dissenting. (Page 125 of the Appendix.)

Petitioners were advised by the Clerk that the Court would not entertain any Petitions for Rehearing addressed to the decision of the Court authorizing Justice Overton to pass on his own qualifications and the unilateral action of Justice Overton in so doing. Application was then made to the Florida Supreme Court for a Stay of the mandate pending the filing of this Petition for Certiorari to the United States Supreme Court, which was granted to February 11, 1980. Application to this Court to continue the Stay of Mandate ordered by the Florida Supreme Court has been duly filed.

ARGUMENT

QUESTION ONE

WHETHER DUE PROCESS REQUIRES A JUDGE TO DISQUALIFY HIMSELF BECAUSE OF A CLOSE INTIMATE PERSONAL FRIENDSHIP WITH ONE

OF THE ATTORNEYS IN A CASE IN WHICH HIS VOTE WOULD BE THE DECIDING VOTE IN A 4-3 DECISION AND OTHER SPECIAL CIRCUMSTANCES.

Canon 3(C)(1) of Florida's Code of Judicial Conduct, adopted 1973, provides that:

> A judge should disqualifify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, . . .

It may be conceded that mere friendship with an attorney, standing alone, is insufficient to require a judge to recuse himself from participating in a case in which the attorney or his firm is interested. Ball v. Yates, 29 So.2d 729 (Fla. 1947); Ervin v. Collins, 85 So.2d 833 (Fla. 1956). But it is equally well settled that every litigant "is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 331 (1931);

State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939); State ex rel. Jensen v. Cannon, 166 So.2d 625 (Fla. App. 3d 1964). The philosophy of the law of Florida in this respect was well set forth in State ex rel. Davis v. Parks, supra, 194 So. at 615. The opinion was authored by the late, very distinguished, Chief Justice Glenn Terrell, who served as a member of the Florida Supreme Court longer than any person in its 142-year history and who was, during his lifetime and since his death, revered as "Mr. Ingrity" of the Florida Supreme Court. In the opinion, Chief Justice Terrell said:

> "This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judi-

ciary and shadow the administration of justice.

"It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

"To force Relator to trial in face of the fear that the suggestion for disqualification warrants would be to impose on him a condition contrary to every principle devised for the administration of justice under our system of jurisprudence. There may in reality, be little basis for his fear but if it's there, the renunciation of the trial judge won't efface it. There is no reason why he should not and every reason why he sould recuse himself under the circumstances.

"The administration of justice is the most sacred rite known to the social order of a democracy. The duty of performing that rite is laid on the bench and bar. No greater commission was ever handed a profession but the same power that gave it can and will withdraw it if

we prostitute it. We can save our commission for posterity by thinking in terms of justice but we cannot save it by exalting the personal equation.

"It follows that the writ of prohibition as prayed for must be and is hereby granted."

In the "Denial of Request for Recusal," Justice Overton did not deny the allegations in the Suggestion for Disqualification, supported by affidavits of disinterested witnesses, that he stated that an attorney who represented the Respondent in the lower court (and allegedly still represents her although not an attorney of record in the appellate proceedings) was his best man at his wedding, handled his campaign when he was running for the Supreme Court, "is the best friend I ever had," and "we visit with each other back and forth." (Pages 70-71 of the Appendix.) This admittedly long-continued and actively close personal friendship must be considered in the

light of the special circumstances here present, referred to above--that is, a legal question that was decided on appeal by a divided appellate court (the two judges constituting the majority having been especially appointed by then Chief Justice Overton to sit during the hearing of the appeal in the instant case) in direct conflict with a decision of the Florida Supreme Court and subsequent decisions concerning the right of an adopted child to inherit from other than his or her adoptive parents, and in which jurisdiction to review the appellate court decision was denied by a divided (4-3) court per curiam without opinion on the first review and again, with a bare majority, on Petition for Rehearing. To paraphrase Chief Justice Terrell's statement in the Davis case, supra, 194 So. at 615,

> There may in reality, be little basis for (Petitioners') fear but if it's there, the renunciation of (Justice Overton) won't efface it. There is no reason why he should not and every reason why he should recuse himself under the circumstances.

The fact that the Suggestion for Disqualification was not filed until after Justice Overton's original participation in the case should not operate as a waiver at the appellate level--particularly where, as here, new justices participated in the cause upon each successive order in the case because of the resignations of two of the justices.

In all the circumstances here, it is respectfully submitted that due process of law requires that the Petitioners have their cause reviewed by the Supreme Court without the participation therein of Justice Overton.

QUESTION TWO

WHETHER A COURT'S ARBITRARY DISREGARD OF

A RIGHT GRANTED BY A STATE CONSTITUTION CONSTITUTES A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW SUFFICIENT TO VIOLATE A LITIGANT'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE UNITED STATES CONSTITUTION.

It is the responsibility of the Supreme Court of Florida under Section 4, Article V. Fla. Const., to resolve conflicts in the law resulting from conflicting decisions of a District Court of Appeal and the Florida Supreme Court. The Supreme Court's decision in In Re Hewett's Estate, supra, 13 So.2d 904, upon which the trial judge relied (Judge James Alderman, now a Florida Supreme Court justice), is appended hereto as pages 19-40 of the Appendix. It will be noted that the Supreme Court ruled clearly and unambiguously that the statute then in effect limited the inheritance of adopted children in intestate estates to the estate of the adoptive parents and that adopted children could

not participate in the intestate estate of the adoptive parents' ancestors "or other blood kin", 13 So.2d at 907. As pointed out in the dissenting opinion of Justice Adkins, subsequent decisions of the Supreme Court and of District Courts of Appeal have reaffirmed this ruling. (Pages 53-59 of the Appendix.) Thus, there is a direct conflict between this decision and that of the appellate court in Rogers v. Hayes, supra, 348 So.2d 896, creating confusion in this area of the jurisprudence of this state which the provisions for "direct conflict" certiorari review was designed to prevent. The Supreme Court's ruling, denying jurisdiction, leaves on rule of law prevailing in the Fourth District Court of Appeal, representing geographically only a few of Florida's sixty-seven counties, and a different rule of law as announced in the

Hewett case for the remaining counties of Florida. Such a condition is intolerable and not only unjust to the litigants here involved, but unfair to the practicing members of the Bar who will not know what the law is. [While the statute, Section 731.30, Fla. Stat., was amended in 1973, it may not have had the effect of changing the rule in Hewett because the statute, as amended, still does not "expressly make the adopted child the heir at law or lineal descendant of the ancestors or blood kindred of the adoptive parents." 27 University of Florida Law Review 1, at pages 12-13: The 1974 Florida Probate Code--A Marriage of Convenience (1975).]

In addition to failing to clarify the law in this important area of the law of descent and distribution, the Supreme Court's action in declining to take jurisdiction has left the Petitioners with

no remedy in the State courts. The duty of Justice Overton to recuse himself from participating in the decision on the Petition for Rehearing, in all the circumstances here present, cannot be gainsaid. Only then can the Petitioners be assured of having their cause considered by a fair and impartial tribunal. Justice Overton is protected by the doctrine of judicial immunity from personal liability for impinging upon Petitioners' right to a fair and impartial trial by declining to recuse himself, as are the other members of the court, constituting a majority, who declined to take jurisdiction of Petitioners' Petition for Certiorari in a clear case of direct conflict. While no decision on this point has been found, it is respectfully submitted that a denial of a litigant's right of review that is patent on the face of the record must

operated as a denial of due process of law within the spirit and intent of this constitutional guarantee which should be redressed to the same extent that other due-process of law denials are zealously protected and redressed by this Honorable Court. Equal justice under hte law, administered by impartial judges, is the keystone in the American system of jurisprudence.

Petitioners here do not seek a decision by the Supreme Court of the United States on the merits of the case but seek through this Petition a direction from the Supreme Court of the United States requiring the Supreme Court of Florida to here the matter on its merits or to decide the question of

jurisdiction by a court panel that does not include Justice Overton.

Respectfully submitted,

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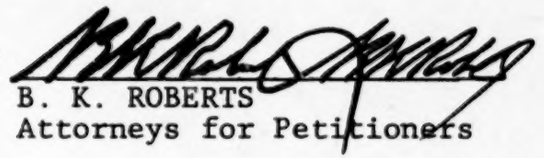
BY 
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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition and Appendix has been furnished to ROBERT JACKSON of Jackson & Clem, P.A., Post Office Box 2397, Vero Beach, Florida, 32960; JOHN T. BRENNAN of the Law Firm of Brennan, McAliley, Hayskar & McAliley, Post Office Box 3779, Fort Pierce, Florida 33450; ALBERTA CARLTON HAYES, Post Office Box 1781, Fort Pierce, Florida 33450; REUBEN W. CARLTON, Route 1, Box 714, Fort Pierce, Florida 33450; and, CHARLES H. CARLTON, 118 Sunrise Boulevard, Fort Pierce, Florida 33450, this 3rd day of April, 1980.

B. K. ROBERTS